Annotated Case Law and Further Reading

(updated June 4, 2003)

I. Annotated Case Law

Tulip Computers International B.V. v. Dell Computer Corporation, 52 Fed. R. Serv. 3d 1420 (D. Del 2002). This case defies classification under any of the following categories, because it illustrates many things that can go wrong when a responding party has no discovery response plan or understanding of its own computer data holdings. The case touches on data destruction, failure to provide a prepared 30(b)(6) witness, and granting the requesting party direct access to the respondent's computer data.

A. Data Preservation

Danis v. USN Communications, 53 Fed. R. Serv. 3d 828 (N. D. Ill. 2000). The failure to take reasonable steps to preserve data at the outset of discovery resulted in a personal fine levied against the defendant's CEO.

In Re *Prudential Insurance Company of America Sales Practice Litigation*, 169 F.R.D. 598 (D. N.J., 1997). Defendant's pattern of failure to prevent unauthorized document destruction warranted $1 million fine and court-ordered measures to enforce document preservation order.

B. Scope of Electronic Discovery

Byers, et al. v. Illinois State Police, et al., 53 Fed. R. Serv. 3d 740 (N.D. Ill. 2002). Plaintiffs in a sex discrimination case requested discovery of email backup tapes going back eight years. Citing Rowe Entertainment and McPeek, among other cases, the court narrowed the request and ordered the plaintiff to assume the cost of restoring the data, including obtaining the necessary software license.

Anti-Monopoly v. Hasbro, 1995 WL 649934 (S.D. N.Y.). "It is black letter law that computerized data is discoverable."

Fennell v. First Step Designs, 83 F. 2d 526 (1st Cir. 1996). Discovery of computer hard drive not justified by mere supposition that relevant evidence might be found.

McPeek v. Ashcroft, 202 F.R.D. 31 (D. D.C., 2001). Retrieval of specific records from computer backup tapes is not within the ordinary and foreseeable course of business, but the restoration of a small sample of the backup tapes will be ordered to determine whether the backup tapes contain relevant discoverable information not available from any other source.

McPeek v. Ashcroft, 212 F.R.D. 33 (D. D.C. 2003) ("McPeek II") Following up on a previous ruling in the same case, Magistrate Judge Facciola held that after ordering "sampling" of a large collection of backup tapes, the resulting data did not support further discovery of any but one of the tapes. The opinion includes a detailed description of the sampling methods used to reach the conclusion.

Stallings-Daniel v. Northern Trust Company, 52 Fed. R. Serv. 3d 1406 (N.D. Ill. 2002). In line with Fennell v. First Step Designs, the court denied the plaintiff's motion for wide-ranging discovery of the defendant's email system, based solely on the allegation that the defendant had mishandled email production in a previous, unrelated case.

Strasser v. Yalamanchi, 669 So.2d 1142 (Fla Ct. App. 1996) ("Strasser I"). Access to a computer hard drive for the purposes of discovery will be denied when the requesting party cannot demonstrate the likelihood of retrieving purged information and cannot show that access is the least intrusive manner to acquire information. But beware of "*Strasser II*," cited below.

Wright v. AmSouth Bancorporation, 320 F. 3d. 1198 (11th Cir. 2003) In a very brief opinion, the 11th Circuit held that the trial court did not abuse its discretion when it held that the plaintiff's request for discovery of "computer diskette or tape copy of all word processing files created, modified and/or accessed by, or on behalf" of five employees of the defendant over a two and one-half year period was not reasonably related to the plaintiff's age discrimination claims, overly broad, and unduly burdensome.

C. Records Management

In re *Cheyenne Software Securities Litigation,* 1997 WL 714891 (E.D. N.Y.). Routine recycling of computer storage media must be halted during discovery, when that is the most reasonable means of preserving data available.

Heveafil Sdn. Bhd. v. United States, 2003 WL 1466193 (Fed. Cir.) (**slip opinion not to be cited as authority**) The Federal Circuit affirmed the judgment of the U.S. Court of International Trade in refusing to admit into evidence computerized business records which, in the trial court's view, were "at best, an unauthenticated duplicate of a database which may have been generated in the ordinary course of business." The Circuit explained that the manufacturer "did not produce evidence explaining how the copy was made, such as an affidavit by an employee with pertinent knowledge verifying the accuracy of the database," and that key source documentation was not retained.

Kozlowski v. Sears, Roebuck, 73 F.R.D. 73 (D. Mass. 1976). (Pre-computer: The defendant cannot adopt a records management system designed to obstruct discovery.)

Lewy v. Remington Arms, 836 F. 2d 1104 (8th Cir. 1988). (Pre-computer: Routine records management procedures must be designed to preserve records which the defendant may reasonably anticipate will be subject to discovery.)

New York National Organization for Women v. Cuomo, 1998 WL 395320 (S.D. N.Y.). Counsel have a duty to advise their client to take reasonable steps to preserve records subject to discovery.

D. Form of Production

In re Bristol-Myers Squibb Securities Litigation, 205 F.R.D. 437 (D. N.J., 2002). Early in the litigation, the parties had agreed to paper production and a per-page price for photocopying. However, the defendant did not disclose that the documents had been scanned, were being "blown back" in paper form at a cost below that of photocopying, and were available in electronic form for considerably less money. The court held the parties to the agreement to produce paper, but at the lower cost of the "blow backs," and ordered that the electronic versions also be produced, at the nominal cost of duplicating compact disks. The court rejected the defendant's argument that the plaintiff contribute to the cost of scanning the documents, as that action was taken unilaterally by the defendant, who didn't inform the plaintiff, for its own purposes. Finally, the court lamented that the parties did not take the "meet and confer" obligations of Fed. R. Civ. Pro. 26(f) seriously in light of electronic discovery.

McNally Tunneling v. City of Evanston, 2001 WL 1568879 (N.D. Ill.). Authority is split on whether a party is entitled to discovery in electronic form as well as paper form, citing Williams v. Owens-Illinois, 665 F. 2d 918 (9th Cir. 1982) denying a request for computerized data to supplement paper production; and *Anti-Monopoly*, holding that a party is entitled to both hard copy and computerized data. In this case, the defendant's request for computer files to supplement the plaintiff's paper production is not supported by any demonstration of need.

E. Use of Experts

Gates Rubber v. Bando Chemical Industries, 167 F.R.D. 90 (D. Colo. 1996). When allowed direct access to the respondent's computer system for the purposes of discovery, the requesting party's unqualified computer discovery expert destroyed 7-8% of discoverable records and compromised the evidential integrity of the rest.

Playboy v. Terri Welles, 60 F. Supp. 3d 1050 (S.D. Cal. 1999). To protect privilege, confidentiality, and the integrity of the evidence, the court will appoint a qualified neutral expert to conduct discovery of the defendant's computer hard drive.

Simon Properties v. MySimon, 194 F.R.D. 639 (S.D. Ind. 2000). The court adapts the *Playboy* approach to a trademark infringement case involving the hard drives of several employees of the defendant. The Supplemental Entry following the Order details the protocol for the expert to follow.

Northwest Airlines v. Local 2000 Teamsters, 00-CV-8 (D. Minn. 2000), discussed in Michael J. McCarthy, *Data Raid: In Airline's Suit, PC Becomes Legal Pawn, Raising Privacy Issues*, Wall Street Journal, May 24, 2000 at A1. In an unreported case, the court adapts the *Playboy* approach, but discovers that the time, costs, and intrusiveness are all greater than originally assumed.

Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al., 51 Fed. R. Serv. 3d 1106; *aff'd*. 53 Fed. R. Serv. 3d 296 (S.D. N.Y. 2002). In allowing the requesting party direct access to the respondent's computer files, the court adopts a protocol in which the requesting party's expert recovers files and the requesting party's attorney reviews them for relevance BEFORE the responding party reviews them for privilege.

F. Costs and Cost Allocation

In re *Air Crash Disaster at Detroit Metropolitan Airport,* 130 F.R.D. 634 (E.D. Mich. 1989). The cost of producing data to the requesting party in a specific format for the purposes of litigation will be borne by the requesting party.

In re *Brand Name Prescription Drugs Litigation,* 1995 WL 360526 (N.D. Ill. 1995). When a defendant chooses a computer-based business system, the cost of retrieving information is an ordinary and foreseeable risk.

Medtronic Sofamor Danek, Inc. v. Gary Karlin Michelson, M.D., et al. 2003 U.S. Dist. LEXIS 8587 (W.D. Tenn.). In an intellectual property case involving spinal fusion medical technology, the defendant sought discovery of information from 996 computer backup tapes and 300 megabytes of data on desktop computers of the plaintiff's employees. The plaintiff objected that the proposed discovery would be unduly costly and burdensome. The court agreed, and applied the eight Rowe factors with painstaking factual detail to determine that the defendant should shoulder most of the costs of the proposed discovery. The court then ordered an equally detailed protocol for the parties to follow in conducting discovery of the backup tapes and hard drives. Finally, the court rejected as unwarranted the defendant's request that a special master be appointed under Fed. R. Civ. P. 53, and instead ordered the parties to agree on a neutral computer expert to supervise discovery under the protocol.

Murphy Oil USA v. Fluor Daniel, 52 Fed. R. Serv. 3d 168 (E.D. La. 2002). Following Rowe, the court offers the defendant two options for proceeding with discovery of email from the computer hard drives and allocating costs. Under one

option, the defendant may forego prior review of email recovered at the plaintiff's expense. Under the second option, the defendant may review, at its own cost, all documents relevant documents recovered by the expert before production to the plaintiff.

Oppenheimer Fund v. Sanders, 437 U.S. 340 (1978). The cost of creating eight new computer programs to identify potential class members from responding party's computer data can reasonably be shifted to the requesting party, when the need for access to the specific data requested is not foreseeable in the normal course of business.

Rowe Entertainment, Inc., et al. v. The William Morris Agency, Inc., et al., 205 F.R.D. 421 (S.D. N.Y., 1106). Balancing eight factors derived from the case law, the plaintiffs will be required to pay for the recovery and production of the defendants' extensive email backups, except for the cost of screening for relevance and privilege.

Zubulake v. UBS Warburg LLC, et al., 2003 U.S. Dist. LEXIS 7939 (S.D.N.Y.) (Opinion and Order dated May 13, 2003). In a sex discrimination suit against a financial services company, the plaintiff requested email beyong the approximately 100 pages produced by the defendants. She presented substantial evidence that more responsive email existed, most likely on backup tapes and optical storage media created and maintained to meet SEC records retention requirements. The defendants objected to producing email from these sources, which they estimated would cost $175,000 exclusive of attorney review time. The district judge held that the plaintiff's request was clearly relevant to her claims, but both parties raised the question of who would pay for the discovery and urged the court to apply the *Rowe* factors. The court held that for data kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes. Further, requiring the responding party to restore and produce responsive documents from a small sample of the requested backup tapes is a sensible approach in most cases. Finally, in conducting the cost-shifting analysis, the court rejected the *Rowe* factors and substituted a seven-factor test.

G. Spoliation and sanctions

GTFM v. Wal-Mart Stores, 49 Fed. Rules Serv. 3d 219 (S.D. N.Y., 2000). Defendant counsel provided inaccurate information to the plaintiffs about computer records early in discovery, and discoverable computer records were later destroyed. The court ordered defendant to pay attorney's fees and costs expended to litigate the sanction motion and recover the data.

Kucala Enterprises, Ltd. v. Auto Wax Company, Inc., 2003 WL 21230605 (N. D. Ill.) Report and Recommendation dated May 27, 2003). In a patent infringement

case, the defendant repeatedly requested documents from the plaintiff, including business records and correspondence from the plaintiff's computer system. After three motions to compel production, the defendant was allowed access to the plaintiff's computer to conduct an inspection. The computer forensics expert conducting the inspection discovered that the plaintiff had used a commercially available disk wiping software, "Evidence Eliminator," to "clean" approximately 3,000 files three days before the inspection, and another 12,000 on the night before the inspection between the hours of midnight and 4 a.m. Based on the totality of the circumstances, the Magistrate Judge found that the spoliation was intentional and recommended to the trial judge that the plaintiff's case be dismissed with prejudice, and that the plaintiff pay the defendant's attorneys fees and costs from the time the Evidence Eliminator was first used.

Linnen v. A.H. Robins, 10 Mass L. Rptr. 189 (Mass. Sup. Ct., 1999). Counsel failed to adequately investigate their client's computer records and holdings, and thereby failed to preserve relevant computer records. In the face of repeated representations before the court that no relevant records existed, a spoliation inference would be a reasonable sanction.

McGuire v. Acufex Microsurgical, 175 F.R.D. 149 (D. Mass. 1997). In an employment case, the human resources director edited a word-processed report of an internal investigation after a state administrative complaint was filed but before suit was filed in federal court. While this action could be considered destruction or alteration of discoverable evidence, it was within the director's authority to do so and not misconduct, and no harm occurred, given that an unedited version of the document was produced from another computer source. However, the facts surrounding the editing would be admissible.

Metropolitan Opera Association, Inc. v. Local 100, Hotel Employees and Restaurant Employees International Union, et. al. 212 F.R.D. 178 (S.D. N.Y. 2003). Contrary to counsel's representations, the defendant had failed to conduct a reasonable investigation to response to discovery requests, failed to prevent the destruction of documents, failed to adequately instruct the person in charge of document collection, and shortly before a scheduled on-site inspection, had allowed computers subject to discovery to be replaced with new computers. The court found that the defendant's behavior constituted a "combination of outrages" and ordered judgment against the defendant with attorneys' fees.

Residential Funding Corp. v. DeGeorge Financial Corp., 306 F. 3d 99 (2d Cir. 2002) Remanding the trial court's denial of a spoliation inference, the Second Circuit holds that the trial judge has the discretion to consider "purposeful sluggishness," resulting in denial of access to email that may include discoverable data, as equivalent to spoliation for Rule 37 purposes. Conduct need not be willful and need not result in the physical destruction of the evidence to be sanctionable.

Sheppard v. River Valley Fitness One, 50 Fed. R. Serv. 3d 1278 (D. N.H. 2001). Defendant attorney's failure to produce requested computer records, attributed to lack of diligence as opposed to intentional obstruction of discovery, warranted a fine of $500 and a testimonial preclusion order.

Strasser v. Yalamanchi, 783 So.2d 1087 (Fla Ct. App. 2001) ("Strasser II"). While delaying discovery to obtain a protective order (see "Strasser I," cited above), the respondent claimed the hard rive was damaged and had to be disposed of, circumstances which the court found suspicious enough to allow a spoliation question to go to the jury.

Trigon Insurance v. United States, 204 F.R.D. 277 (E.D. Va., 2001). In a corporate taxpayer suit against the United States, the United States hired a litigation support firm, which in turn hired experts to act as consultants and testifying experts. The litigation support firm had a policy under which all email communications with experts and draft reports were destroyed. The court held that under the facts of this case, those communications and drafts would have been discoverable, and the United States was responsible for its litigation support firm's intentional spoliation. Adverse inferences regarding the content of the destroyed electronic documents were appropriate.

William T. Thompson Company v. General Nutrition, 593 F. Supp. 1443 (C. D. Cal. 1984). The court entered default against the defendant for destroying computer records subject to discovery.

II. Further Reading

A. Current Awareness

<http://www.kenwithers.com/>

This web site is maintained by Ken Withers of the Federal Judicial Center, but is unofficial. It contains articles on electronic discovery, sets of PowerPoint slides and text from judicial education and bar association seminars on electronic discovery, and additional resources.

<http://CaliforniaDiscovery.findlaw.com>

This web site is maintained by California State Court Commissioner Richard Best of San Francisco, but is unofficial. It contains an exhaustive outline of electronic discovery issues.

Digital Discovery and E-Evidence

This is a monthly publication of Pike & Fischer, a divisions of BNA. It reports on recent cases and contains analysis by experts. $649.00/year. Subscription information and sample articles may be found at <http://www.pf.com/digitaldisc.asp>.

Electronic discovery and computer forensics vendor sites

Of the scores of electronic discovery and computer forensics firms currently doing business in North America, a handful have developed useful educational web sites to keep their current and prospective clients up-to-date on the law. These sites feature state and federal case law dealing with electronic discovery, computer forensics, and electronic evidence; "white papers" and links to leading law review articles; and sample forms for practitioners. Three good examples are:

Applied Discovery

<http://www.applieddiscovery.com/lawLibrary/default.asp>

Computer Forensics, Inc.

<http://www.forensics.com/html/resource_center.html>

Kroll-Ontrack

< http://www.krollontrack.com/LawLibrary/>

B. Recent Articles

Lisa Arent, Robert D. Brownstone and William A. Fenwick, *E-Discovery: Preserving, Requesting & Producing Electronic Information*, 19 Santa Clara Computer and High Technology Law Journal 131 (2002).

A thorough review of current case law dealing with data preservation and the scope of electronic discovery, with valuable practice tips for lawyers and advice for clients.

Mary Kay Brown and Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 Pa. B. A. Q. 1 (2003).

An introduction to the fundamental technical issues, relevant rules, and case law governing electronic discovery, presented in an easy-to-follow question-and-answer format. Perfect for the novice practitioner or nervous in-house counsel.

Barbara A. Caulfield and Zuzana Svihra, *Electronic Discovery Issues for 2002: Requiring the Losing Party to Pay for the Costs of Digital Discovery*, <http://www.kenwithers.com/articles/> (2001).

> In this paper from the 2001 Sedona Conference on Complex Litigation, the authors argue that an English-style cost shifting rule, under which the prevailing party in litigation recovers discovery costs, may curb the perceived abuses and "economic waste" associated with electronic discovery.

Geoff Howard and Hadi Razzaq, *Electronic Discovery Cost Allocation: Why Requesting Parties May Increasingly Find Themselves* Rowe-*ing Upstream to Fund Electronic Fishing Expeditions,* ABA Computer and Internet Litigation Journal (May 24, 2002).

> This paper explores the differences between conventional and electronic discovery, focussing on costs, and dissects the Rowe Entertainment case to support an argument that federal courts will increasingly shift electronic discovery costs to requesting parties.

Richard L. Marcus*, Confronting the Future: Coping With Discovery of Electronic Material*, 64 Law & Contemp. Probs. 253 (Spring/Summer 2001).

> Prof. Marcus, the reporter for the Discovery Subcommittee of the Civil Rules Advisory Committee, summarizes the problem of electronic discovery as it has been presented to the Subcommittee and presents a list of the various amendment ideas that have surfaced in the literature and from the discussions.

Michael Marron, *Discoverability of "Deleted" E-Mail: Time for a Closer Examination*, 25 Seattle U. L. Rev. 895 (2002).

> "[T]his Comment will argue that the discovery rules presently require disclosure of an unacceptable amount of information. In particular, public policy concerns such as communication efficiency, individual privacy, and free speech should outweigh the rights of a litigant to access deleted e-mail correspondence without some showing of particular relevance or need."

Carey Sirota Meyer and Kari L. Wraspir, *E-Discovery: Preparing Clients For (and Protecting Them Against) Discovery the Electronic Age*, 26 William Mitchell Law Review 939 (2000).

> An introductory-level, somewhat superficial review of electronic discovery. While this article contains no deep analysis or new revelations, it may serve as background material to instruct clients, especially in-house counsel, who are not aware of their electronic discovery obligations.

Marnie H. Pulver, *Electronic Media Discovery: The Economic Benefit of Pay-Per-View*, 21 Cardozo L. Rev. 1379 (2000).

"An economic analysis of relevant case law illustrates the inefficiency of modern discovery rules as applied to EMD [electronic media discovery]. Modern discovery practice often leads to misallocated funds and wasted human capita. The misallocated resources stem from an externalized discovery practice. Efficient allocation can be achieved only when the costs and benefits of EMD are internalized." In other words, the author proposes that all electronic discovery costs be borne by the requesting party.

Jonathan M. Redgrave and Ted S. Hiser, *Fishing in the Ocean: A Critical Examination of Discovery in the Electronic Age*, <http://www.kenwithers.com/articles/>(2001).

In this paper from the 2001 Sedona Conference on Complex Litigation, the authors explore the explosive growth of the "paperless" business environment, review the history of judicial concern about "fishing expeditions," apply these historic concerns to electronic discovery, and argue for a flexible judicial approach the question of scope.

Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L. J. 561 (2001), <http://www.law.duke.edu/journals/dlj/dljtoc51n2.htm>.

Prof. Redish argues that electronic discovery is unique and demands a different set of rules and procedures than conventional, paper-based discovery to prevent undue costs, burden, and intrusion.

Hon. James M. Rosenbaum, *In Defense of the DELETE Key*, 3 Green Bag 2d 393 (2000); *In Defense of the Hard Drive*, 4 Green Bag 2d 169 (2001).

In a pair of short, provocative articles, a federal district court judge and member of the Judicial Conference of the United States expresses his concern that far-reaching computer-based discovery may violate privacy and stifle creative thought. In the first article, he proposes a 'statute of limitations' on the recovery of stale, deleted files. In the second, he proposes a 'cyber time-out,' a notice period for employees, during which their computer files are sequestered, before employers may investigate them. This would allow the employer and employee to negotiate the scope and conditions of the investigation, preventing de facto general searches.

Samuel A. Thumma and Darrel S. Jackson, *The History of Electronic Mail in Litigation*, 16 Santa Clara Computer and High Tech. L. J. 1 (1999).

An interesting and entertaining survey of the evolving role of email as either evidence or subject matter in both civil and criminal cases from the early 1980's through June, 1999. Of particular interest is extensive use of email to establish elements of various commercial actions, such as jurisdiction, statute of limitations, and notice.

Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 Up to the Task?*, 41 B. C. L. Rev. 327 (2000).

> A federal district court judge takes a close look at the technology, current rules, and case law surrounding computer-based discovery, and proposed two amendments to Rule 34. One change would clarify the scope of document discovery, replacing the 1970 language ("other data compilations from which information can be obtained") with more modern language ("electronically-stored information"). An new paragraph added to Rule 34 would establish a presumption that discovery of computer data would be subject to a protective order and establish a presumption that costs for producing data in print form, as opposed to electronic media, would be borne by the requesting party.

Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Retaining, Destroying and Producing E-Data*, New York Law Journal, (Part One) May 8, 2002, at 1; (Part Two) May 9, 2002, at 1.

> Judge Scheindlin returns to the topic of electronic discovery in this two-part article, this time focussing on obligations related to the retention and destruction of electronically-stored information and business records, as well as the production of such data in civil litigation. She reviews several important recent cases in which poor electronic records management practices and failures during the discovery process resulted in sanctions against defendants, including *Linnen*, *GTFM*, and *Danis*. She concludes that a written electronic records management policy, a thorough understanding of a client's actual compliance with that policy, and early disclosure are key elements to successful discovery for both sides.

The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,
<http://www.thesedonaconference.org/publications_html> (March 2003).

> This is the initial product of a think tank representing the best and brightest of the private defense bar, in-house corporate counsel, and defense-oriented technical consultants. As a working document, the authors invite observations, comments, and criticism.

Point/Counterpoint: Should the Federal Rules of Civil Procedure be Amended to Accommodate Electronic Discovery? <http://www.kenwithers.com/articles/> (2001).

> Computer-based discovery presents new and unique challenges for judges, lawyers, and parties in civil litigation. But does it demand amendments to the Federal Rules of Civil Procedure? two very different points of view are presented: "Yes" says Tom Allman, General Counsel of BASF Corporation. "No" say the New York State Bar Association's Commercial and Federal Litigation Section, Committee on Federal Procedure.